STATE OF MICHIGAN

COURT OF APPEALS

KEITH MILES,

Plaintiff-Appellee,

v

CITY OF BAY CITY,

Defendant-Appellant.

UNPUBLISHED
May 20, 2014

No. 310972
Bay Circuit Court
LC No. 11-003189-CD

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

By leave granted, defendant appeals the trial court's order denying in part its motion for summary disposition in this age-discrimination action. We reverse and remand for entry of summary disposition in favor of defendant.

Plaintiff was employed by defendant as the "Information Systems Administrator" from November 16, 2000, until November 29, 2010. Plaintiff's employment was subject to defendant's workplace-violence policy, which incorporates a zero-tolerance policy concerning violent or threatening behavior. The policy defines workplace violence as any act that is physically or verbally assaultive or abusive, including "verbal harassment" that "would cause a reasonable person to feel terrorized, frightened, intimidated, harassed, or molested."

On October 18, 2010, plaintiff confronted a temporary employee, Randy Beutel, regarding Beutel's statement to plaintiff's supervisor that a facility plaintiff was working on known as "the bank" would not open on schedule. When plaintiff learned that Beutel had voiced his concerns, plaintiff called him into a closed-door meeting. According to Beutel, plaintiff shouted at him, "don't go above my f---ing head like that," and reminded Beutel that he was a temporary employee and that plaintiff would terminate his position if he did not sit quietly and do only what others tell him to do. Plaintiff admitted that he had a conversation with Beutel regarding Beutel's statement to his supervisor, but plaintiff denied that he raised his voice, used profanity, or told Beutel to sit quietly or be fired.

Beutel reported his encounter with plaintiff to defendant's human-resources director, Wendy White, who began an investigation. White interviewed Beutel and other employees. She also interviewed plaintiff's employees in the information-systems department, who reported that plaintiff frequently yelled at them and used profanity and that he angered easily and could be verbally abusive. On November 9, 2010, White held a "due process" meeting with plaintiff and

union steward Mark Provost. After the meeting, White determined that plaintiff was in violation of the city's workplace-violence policy because of his action with Beutel. On November 29, 2010, plaintiff was presented with notice of a ten-day suspension and a last-chance agreement. Plaintiff refused to sign the agreement and submitted his letter of resignation that day.

Plaintiff filed this action alleging age discrimination in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and a public-policy claim. Defendant moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), asserting that the public-policy claim was preempted by federal law and that plaintiff failed to establish a prima-facie case of age discrimination or to rebut defendant's articulated non-discriminatory reason for the employment action. After hearing argument, the trial court granted defendant summary disposition on the public-policy claim, but denied defendant summary disposition on the age-discrimination claim. The court held that plaintiff presented sufficient evidence for a prima-facie case of age discrimination and to show that defendant's articulated non-discriminatory reason for its action was a pretext for age discrimination. The court further held that there was a question of fact concerning whether plaintiff was constructively discharged.

We review de novo a trial court's decision concerning a motion for summary disposition. *Jarrad v Integon Nat'l Ins Co*, 472 Mich 207, 212; 696 NW2d 621 (2005). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating the motion, a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party. *Id*. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiff's age-discrimination claim is based upon the CRA, which states, in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . . [MCL 37.2202.]

When there is direct evidence of age discrimination, the plaintiff may proceed and prove the unlawful discrimination in the same manner as in any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462, 466 n 12; 628 NW2d 515 (2001). However, when, as here, there is no direct evidence of age discrimination, the plaintiff must rely on the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 187, 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462. Under this framework, plaintiff must first establish a prima-facie case of age discrimination. *Id*. at 463. In order to establish a prima-facie case of age discrimination under the CRA, a plaintiff must produce evidence sufficient to show that: (1) he was a member of a protected class; (2) he was subject to an adverse employment decision; (3) he was qualified for the position; and (4) he was adversely treated under circumstances that give rise to an inference of unlawful discrimination. *Id*.; *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). A plaintiff who establishes a prima-facie case of discrimination receives the benefit of a presumption that the employer unlawfully discriminated against him. *Hazle*, 464 Mich at 463 (explaining that the presumption arises because courts presume that the employer's

acts, if not otherwise explained, were more likely than not based on the consideration of impermissible factors).

If the plaintiff successfully establishes a prima-facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Lytle*, 458 Mich at 173. Should the defendant carry this burden, the presumption created by the prima-facie case drops away. *Hazle*, 464 Mich at 465. "At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id.*, quoting *Lytle*, 458 Mich at 176. "[A] plaintiff 'must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination.'" *Hazle*, 464 Mich at 465-466, quoting *Lytle*, 458 at 175-176. As the Michigan Supreme Court has explained:

> The inquiry at this final stage of the *McDonnell Douglas* framework is exactly the same as the ultimate factual inquiry made by the jury: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision. See SJI2d 105.02. The only difference is that, for purposes of a motion for summary disposition or directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision. [*Hazle*, 464 Mich at 466.]

At issue in this appeal is plaintiff's ability to establish the second element of the prima-facie case, which requires proof that plaintiff suffered an adverse employment action.[1]

Defendant argues that the ten-day suspension and last-chance agreement did not constitute an adverse employment action because there was no materially adverse change in the terms and conditions of plaintiff's employment. Defendant further argues that plaintiff did not suffer a constructive discharge because plaintiff voluntarily chose to resign and there was no evidence that plaintiff would have faced intolerable working conditions or that defendant intended to force plaintiff to quit.

This Court has explained the term "adverse employment action" as follows:

> There is no exhaustive list of what constitutes adverse employment actions. . . . Nevertheless, regardless of the employment context, in order to be actionable, an employment action must be materially adverse to the employee—that is, it must be more than a mere inconvenience or minor alteration of job responsibilities. In addition, there must be an objective basis for demonstrating that the employment action is adverse because a plaintiff's subjective impressions

[1] The other elements are not in dispute because plaintiff was replaced with a younger worker after he resigned.

> are not controlling. Materially adverse employment actions are akin to termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. [*Chen v Wayne State Univ*, 284 Mich App 172, 201-202; 771 NW2d 820 (2009) (internal citations and quotation marks omitted).]

In addition, "[c]onstructive discharge may be found where working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985).[2] "A finding of constructive discharge depends on the facts of each case" and "requires inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct on the employee." *Id*. "An employer is held to intend the reasonably foreseeable consequences of his conduct." *Id*.

> In *Jenkins*, the plaintiff was told to either accept a new position or resign. The new position not only paid the same salary as plaintiff's former job, but also included a car and an expense account. Nevertheless, this Court held that a reasonable factfinder in that case could find constructive discharge because the new job was not the substantial equivalent of the position from which the plaintiff was discharged. The new position was a demotion and the job responsibilities were severely reduced. [*Wolff v Auto Club of Michigan*, 194 Mich App 6, 15; 486 NW2d 75 (1992).]

In the instant case, plaintiff was required to agree to the last-chance agreement and a ten-day suspension or face termination. Notably, one provision of the last-chance agreement required plaintiff to waive his union-grievance rights:

> If Human Resources or your Supervisor receive any complaint from any City worker that you have [violated the workplace-violence policy], you will be considered insubordinate as well as in violation of this last chance agreement, which will result in termination of your employment.

Another provision forbade plaintiff from having any "one-on-one" "closed door" meetings with city employees.

Under these circumstances, we agree with the trial court that a reasonable fact-finder could conclude that plaintiff suffered an adverse employment action. In particular, the provision requiring defendant to waive his union-grievance rights was undoubtedly "materially adverse to the employee" because it would cause a material loss of benefits. *Chen*, 284 Mich App at 201-202. Regarding constructive discharge, the trial court did not err in holding that a reasonable

[2] We note that this opinion was initially overruled on other grounds as stated in *Elezovic v Ford Motor Co*, 472 Mich 408, 412 n 6; 697 NW2d 851 (2005). *Elezovic* then adopted the position stated in *Jenkins*. *Id*. at 411.

fact-finder could conclude that the foreseeable impact of defendant's conduct was that plaintiff's working conditions would become so difficult that a reasonable person in plaintiff's shoes would have felt compelled to resign. *Jenkins*, 141 Mich App at 796.

Because plaintiff established a prima-facie case, the burden shifted to defendant to rebut the presumption that it engaged in age discrimination. Defendant met this burden by presenting considerable evidence that the adverse employment action was the result of defendant's good-faith belief that plaintiff violated the workplace-violence policy. The burden thus shifted back to plaintiff to prove that defendant's proffered reason was merely a pretext for discrimination. "[I]n order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Hazle*, 464 Mich at 465, quoting *Lytle*, 458 Mich at 176.

"A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Plaintiff compared his situation to three other employees who had been found in violation of the workplace violence policy, asserting that while he received a ten-day suspension, other employees were offered merely warnings or three- and five-day suspensions for similar misconduct. To create an inference of disparate treatment in order to show pretext, a plaintiff must prove that other employees similarly situated in all relevant aspects were treated differently for the same conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

The first employee left an inappropriate voicemail message on an employee's answering machine. She was offered a ten-day suspension but her union representative negotiated the suspension down to three days, with seven days held "in abeyance" in exchange for the employee and the union not grieving the discipline. The employee was 62 years old at the time she was disciplined. Because the employee was also a member of the same protected class (she was in fact older than plaintiff), her discipline is not probative of unlawful treatment of plaintiff.

The second employee was disciplined for using threatening language toward a coworker. He was also offered a ten-day suspension and last-chance agreement, but his union representative negotiated the suspension down to five unpaid days and five "lost" vacation days. Although plaintiff's suspension was ten unpaid days, this minor distinction is insufficient to show that this second employee was treated substantially differently from plaintiff. There is little monetary distinction between ten unpaid days and five unpaid days plus five "lost" vacation days.

The third employee was on the receiving end of the second employee's threatening language. He was found to have provoked the workplace violence. This third employee received a written reprimand. Because this employee was not the aggressor and committed a minor violation, he was not similarly situated with plaintiff.

Plaintiff failed to present evidence that other employees similarly situated in relevant aspects were treated differently for the same conduct. Plaintiff's additional arguments in favor of finding a pretext are unpersuasive. After our review of the record, we hold that plaintiff simply failed to present sufficient evidence to permit a reasonable trier of fact to conclude that defendant's articulated, nondiscriminatory reason for the adverse employment action was a pretext for age discrimination or that age discrimination was a motivating factor for the adverse employment action taken by defendant. Accordingly, the trial court erred in denying defendant's motion for summary disposition on the age discrimination claim.

We reverse the trial court's order in part and remand for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan